Supreme Court of the United States

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON,

Petitioner,

—v.—

MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

Criminal Trials No. 5595

STATE OF MARYLAND, PLAINTIFF

vs.

JOHN DALMER BENTON, DEFENDANT

DOCKET ENTRIES (excerpts)

1965, April 22nd:	Presentment and Indictment for BURGLARY, COMMON LAW HOUSE BREAKING, LARCENY, filed. Bench Warrant issued and with copy of Indictment delivered to Sheriff for service.
* * * *	
1965, August 4th:	State abandons its right to prosecute the 2nd Count, Housebreaking, in C.T. 5595. Verdict: "Guilty" as to the 1st Count, Burglary and "Not Guilty" as to the 3rd Count, Larceny. "Not Guilty" as to assault and battery in C.A. 9424. Sentencing deferred.
* * * *	
1965, August 16th:	Sentenced by the Court (Judges Robert B. Mathias and Ernest A. Loveless, Jr., presiding; Donald Johnson, Reporter) that John D. Benton be confined in the Maryland House of Correction for a period of 10 years, sentence to commence as of August 4, 1965. Appeal Bond set at $7,500.00.
* * * *	

D(TRIES (excerpts)

1965, September : ce of Appeal to the Court of als of Maryland, filed.

* *

1966, January 17th ite, Court of Appeals of Mary- iled.

ied for further proceedings.

* *

1966, June 30th: nt challenges the array of d Jury.

oscoe H. Parker, presiding; Trankle, Reporter) (See

* * * *

IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

Criminal Trials No. 6369

STATE OF MARYLAND, PLAINTIFF

vs.

JOHN DALMER BENTON, DEFENDANT

DOCKET ENTRIES (excerpts)

1966, June 3rd: Presentment and Indictment for BURGLARY, COMMON LAW HOUSEBREAKING, LARCENY, filed. Bench Warrant issued and with copy of Indictment delivered to Sheriff for service.

* * * *

DOCKET ENTRIES (excerpts)

1966, August 11th:	State abandons prosecution on Count #2
	Verdict
	Guilty
	Sentenced by the Court, Judge Roscoe H. Parker, (William Trankle, Reporter) that John Dalmer Benton, Defendant, serve a term of fifteen (15) years in the Maryland Penitentiary on Count #1 and five (5) years on Count #(3) to run concurrent.
	Motion by counsel for Defense for Appeal bond.
	Motion Denied.

* * * *

[1] IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

Criminal Trials No. 6369

[Title Omitted]

TRANSCRIPT OF PROCEEDINGS—August 11, 1966

* * * *

[2] MR. O'MALLEY: Your Honor, may we approach the bench?

THE COURT: Yes.

(Whereupon, counsel approached the bench, and the following proceedings were had out of the hearing of the prospective jury:)

MR. O'MALLEY: Your Honor, I would suggest to the Court that the defendant is now charged with the crimes of burglary, housebreaking and larceny; that at a previous time he was found not guilty of housebreaking

and larceny, he was found guilty of common law burglary. The common law burglary was appealed to the Court of Appeals, and while pending, by virtue of the Schowgurow decision, it was remanded to this Court, at which time the defendant elected to have a retrial. It is the position of the defendant that the housebreaking and larceny counts, the second and third respectively, of this indictment should be dismissed, should be a bar in jeopardy as in regards to the present prosecution on those counts, and that is our motion.

THE COURT: What is your position?

MR. CHASANOW: Your Honor, we feel the Schowgurow decision is distinguishable from the Barger case. In the Barger case there was a new trial granted because of the instructions, and the Court held under those circumstances you could not retry him for the graver count when he was found not guilty of first degree murder. In the Barger case, in the opinion of the Court of Appeals, they said we are dealing only with this specific question, and I believe made mention of the fact they were not dealing with the Schowgurow remand.

We think because of the position that the defendant found himself in when the Court of Appeals remanded [3] this, he had an election either to allow the conviction to stand on the burglary or attack the whole indictment because of the Schowgurow defect; that he elected to attack the whole indictment and, therefore, has placed himself in the position of being tried on the whole indictment when reindicted, and we feel this is distinguishable.

THE COURT: Yes. I can't see under the Schowgurow decision where this would be double jeopardy, where he is asking for another trial.

MR. O'MALLEY: The Schowgurow decision took pains to state that nothing in that opinion was to be retrospective, and you can't resurrect a not guilty unless you are retrospective.

THE COURT: Well, we will wait and see.

MR. O'MALLEY: Is Your Honor denying my motion?

THE COURT: That is true.

* * * *

IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

Criminal Trials No. 6369

STATE OF MARYLAND

v.

JOHN DALMER BENTON, DEFENDANT

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO OR IN THE ALTERNATIVE FOR A NEW TRIAL—
Filed August 16, 1966

Comes now the defendant through counsel and moves this Court for a judgment non obstante veredicto or in the alternative for a new trial and in support of said motion represents to the Court as follows:

1. The defendant was found guilty of "Burglary" and "Larceny" on August 11, 1966 and sentenced to serve fifteen (15) years on the "Burglary" count and five (5) years on the "Larceny" count, the sentences to run concurrently.

2. Prior to this trial the defendant was found "not guilty" on the "Larceny" count as well as assault on the complaining witnesses. The defendant made a motion prior to trial pleading that the "larceny" count was barred by jeopardy but said motion was denied. The court therefore erroneously admitted into evidence facts supporting the "larceny" count as well as a basis for the felonious intent required in the "Burglary" count.

3. Prior to the introduction of evidence the defendant petitioned the Court to bar the introduction of any testimony relating to assault on the complaining witnesses in that the defendant had already been found not guilty of such offenses. The Court erroneously denied the defend-

ant's petition and permitted this testimony as regards "other crimes". Such testimony was prejudicial to the defense.

4. The evidence established that house in question had been locked prior to the defendant's entrance but no evidence was introduced to show a "breaking" as is required in common law burglary. The Court therefore, at the conclusion of all of the evidence, erroneously denied defendant's motion for judgment of acquittal.

5. The Court, without request having been made by the defendant, instructed the jury in an "advisory way" with regard to the defendant's failure to take the stand in his own defense. The Court further instructed the jury that they were not bound to follow this instruction but that they were the final arbiters of the law as well as the facts. Upon objection by the defendant the Court refused to alter it's instruction. The instruction given violated the defendant's rights under the Fifth Amendment of the Constitution of the United States.

WHEREFORE, it is respectfully moved that a judgment non-obstante veredicto be entered herein as regards both counts of the Indictment or in the alternative that a new trial be granted.

/s/ Thomas M. O'Malley

/s/ Michael F. X. Dolan
Attorneys for Defendant
1629 K Street, N. W.
Washington, D. C.

[1] IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

Criminal Trials No. 6369

[Title Omitted]

TRANSCRIPT OF PROCEEDINGS—August 25, 1966

The above-entitled matter came on for argument on the defendant's motion for Judgment N. O. V. or in the alternative for a New Trial in open court at 9:35 o'clock, a.m.

* * * *

[7] MR. CHASANOW: * * *

As to the second contention, first of all as to Schowgurow, the defendant, following the Schowgurow decision, attacked the indictment and attacked his conviction because the Court had no jurisdiction to try the case because the grand jury was illegally constituted. I don't think, in the grand jury decision, he can say, "I think my trial was invalid, the Court lacked jurisdiction, but this part of the trial was okay. I want to attack this part of the trial."

He is attacking the trial. He is entitled to a new trial because the Court was without jurisdiction to try him, the grand jury was illegally constituted. But when he attacks the trial, he can't say "I just want to leave part of it as valid and let me just pick and choose what part I want to say is invalid." The whole thing is under attack. The whole trial is invalid. The State can certainly reap a little benefit out of that.

* * * *

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 252

Initial Term, 1967

JOHN DALMER BENTON

v.

STATE OF MARYLAND

Anderson
Morton
Orth
Thompson
O'Donnell, William J.
(specially assigned)
JJ.

OPINION BY ANDERSON, J—Filed: August 17, 1967

Appellant, John Dalmer Benton, was indicted under a three count indictment charging him in the first count with burglary, in the second count with housebreaking and in the third count with larceny. He was tried on April 22, 1965, in the Circuit Court for Prince George's County before a jury. The State abandoned the second count and the jury returned a verdict of guilty as to the first count (burglary) and not guilty as to the third count (larceny). Appellant was sentenced on the burglary conviction to ten years in the House of Correction. Thereafter he noted an appeal to the Court of Appeals of Maryland.

Prior to a hearing on the merits of his appeal and on the basis of the decisions of the Court of Appeals in *Schowgurow* v. *State*, 240 Md. 121, 213 A. 2d 475 (1965); *State* v. *Madison*, 240 Md. 265, 213 A. 2d 880 (1965); *Smith* v. *State*, 240 Md. 464, 214 A. 2d 563 and *Hays*

and Wainwright v. *State*, 240 Md. 482, 214 A. 2d 573 (1965), the case was remanded by order of the Court of Appeals to the lower court for the purpose of ascertaining whether the appellant desired to avail himself of the relief afforded by the aforesaid rulings handed down by that Court in those cases. Appellant elected to avail himself of such relief and have the indictment upon which he was originally tried declared invalid.

On June 3, 1965, appellant was reindicted under a similar three count indictment charging him with burglary, housebreaking, and larceny. Prior to trial appellant moved to dismiss the larceny count on the grounds of double jeopardy. The court denied the motion and on August 11, 1965 appellant was retried in the same court before a jury, Judge Roscoe H. Parker presiding. The State again abandoned the second count and the jury returned a verdict of guilty on the first count (burglary) and guilty on the third count (larceny). He was sentenced to fifteen years in the Maryland Penitentiary on the first count and five years in the Maryland Penitentiary on the third count, sentences to run concurrently. From his convictions and sentences he now appeals to this Court.

Appellant raises four contentions on this appeal: (1) that appellant was placed in double jeopardy when the trial court allowed the State to prosecute appellant on the larceny charge when he had previously been found to be not guilty of larceny; (2) that appellant was prejudiced as a result of the larceny charge; (3) that the trial court abused its discretion by failing to grant a removal of the case to another jurisdiction; and (4) that the trial court should have instructed the jury in mandatory terms not to infer guilt from appellant's refusal to testify.

I

In support of his first contention appellant argues that the answer lies in the very language of the remand where the Court of Appeals said: ". . . appellant herein was indicted by an illegally constituted Grand Jury and/or was tried and convicted by a Petit Jury before our decisions in *Schowgurow*, *Madison*, *Smith*, *Hays* and *Wain-*

wright and that the appellant's conviction had not become final before our decision in *Schowgurow*." By the above language he contends that the court made specific reference to the fact that it was remanding only the conviction and not all of the charges under the indictment, and that obviously appellant was only appealing the charge that he was convicted of and the Appellate Court could remand no more than was before it.

The same contention was raised before this Court in *Sadler* v. *State*, 1 Md. App. 383 (1967). In the *Sadler* case the facts were quite similar to the facts here. There this Court said: "Assuming, without deciding, that the Appellants are correct in their assertion that the action of the lower court in the first trial amounted to judgments of acquittal on the charges of assault with intent to rape and assault, we are of the opinion that their second trial did not constitute placing them in double jeopardy." In arriving at this conclusion this Court relied upon the decision of the Court of Appeals of Maryland in *Tate* v. *State*, 236 Md. 312, 316 (1964) where the Court said:

> "It has been held repeatedly in this State that when a traverser has been tried on an indictment or information that is invalid, he is not in jeopardy and he may be indicted and tried again. *State ex rel. Shatzer* v. *Warden*, 192 Md. 728, 64 A. 2d 711; *Kenny* v. *State*, 121 Md. 120, 87 Atl. 1109; *Stearns* v. *State*, 81 Md. 341, 32 Atl. 282."

In *Sadler* this Court found that the appellants by their election to have the indictments involved in their first trial declared invalid under *Schowgurow*, *supra*, and *State* v. *Madison*, *supra*, brought their cases squarely within the rule set forth in *Tate* v. *State*, *supra*.

In *Smith* v. *State*, *supra*, the Court pointed out that the holding in *Schowgurow* and *Madison*, *supra*, "does not render the judicial proceeding based upon the indictment null and void but only gives the defendant the right, by timely action, to attack it." Here the appellant exercised his right, by timely action, to attack his indictment. His attack resulted in the indictment being held

invalid which brings his case within the rule stated in *Tate*.

It is true that the Court of Appeals has held "that where there has been a regular trial on a valid indictment and a finding of not guilty of a specific offense, the accused cannot thereafter be tried again at the instigation of the State for the same offense." *State* v. *Barger*, 242 Md. 616, 625, 626, 220 A. 2d 304 (1966). But this rule is predicated upon a valid indictment. In the instant case the appellant's original indictment by his election was invalidated.

We, therefore, reaffirm our holding in *Sadler* v. *State*, *supra*, and find appellant's first contention to be without merit. See *United States* v. *Ewell*, 383 U.S. 116 and *United States* v. *Tateo*, 377 U.S. 463.

II

Since we find appellant's first contention to be without merit he could not have been prejudiced at his new trial as a result of the larceny charge, and we, therefore, find his second contention to be without merit.

III

Thirdly, appellant contends that the trial court abused its discretion by failing to grant a removal of the case to another jurisdiction.

Appellant contends that the complaining witness is a well known practicing lawyer in Prince George's County, and the situs of the crime, the home of the complaining witness, is used as a recreation and gathering place for prominent County residents. Appellant admits that while a criminal defendant has no absolute right to removal in a non-capital case, *Heslop* v. *State*, 202 Md. 123, 95 A. 2d 880 (1953), the court should grant a motion for removal where the defendant shows he may be tried in a prejudicial atmosphere.

"The question of whether a non-capital criminal case should be removed to another jurisdiction is one which rests within the trial court's discretion, Maryland Constitution, Art. IV, Sec. 8; Maryland Rules 542 a (1) and

738 (b); but the trial court's decision is reviewable on appeal for a determination of whether there has been abuse of discretion. *Downs* v. *State*, 111 Md. 241, 73 A. 893; *Piracci* v. *State*, 207 Md. 499, 509, 115 A. 2d 262; *Basiliko* v. *State*, 212 Md. 248, 129 A. 2d 375." *Seidman* v. *State*, 230 Md. 305, 324, 187 A. 2d 109 (1962).

We find no abuse of discretion by the trial court. Appellant did not meet his burden of persuasion with regard to his claim, for the accused must make an affirmative showing that he has been prejudiced by adverse publicity, and that the accused was not in a position to rely upon the voir dire examination for protection against a prejudiced juror. *Seidman* v. *State*, *supra*, and cases therein cited.

Here, as pointed out by the trial judge, there was no great publicity regarding the case, no prejudicial statements made in the paper, no inflamatory remarks made about the defendant in the County and there was no exercise of *voir dire* as to anybody knowing the prosecuting witness or whether he had ever acted as a lawyer. In fact, the Judge said Mr. West, the prosecuting witness, was primarily in the real estate business and he found no prejudice.

IV

Appellant's fourth and final contention is that the trial court should have instructed the jury in mandatory terms not to infer guilt from appellant's refusal to testify. Article 15, Sec. 5, of the Maryland Constitution provides that "in all criminal cases the jury shall be the judges of law as well as fact, except that the court may pass upon the sufficiency of evidence to sustain conviction." The section's constitutionality, in the light of the Fourteenth Amendment to the Constitution of the United States, was exhaustively reviewed in *Slansky* v. *State*, 192 Md. 94, 63 A. 2d 599 (1948), and reaffirmed in *Giles* v. *State*, 229 Md. 370, 382, 183 A. 2d 359 (1961), a case that was subsequently dismissed by the United States Supreme Court in *Giles* v. *Maryland*, 372 U.S. 767 (1963).

Although the court's instruction was in an advisory capacity, he told the jury that they were not to attach

any significance or inference of guilt from appellant's failure to take the witness stand because every individual has an absolute constitutional right not to testify, and no inference of guilt can be presumed because he chose not to take the stand. We find no error in the court's instruction in this regard.

For the above reasons, the judgment of the lower court will be affirmed.

Judgment affirmed; costs to be paid by appellant.

SUPREME COURT OF THE UNITED STATES

No. 1185 Misc., October Term, 1967

JOHN DALMER BENTON, PETITIONER

v.

MARYLAND

On petition for writ of Certiorari to the Court of Special Appeals of the State of Maryland.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 17, 1968

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following questions:

(1) Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?

(2) If so, was the petitioner "twice put in jeopardy" in this case?

The case is transferred to the appellate docket as No. 1539 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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